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APPELLANT'S BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1925

No. 44

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, *Appellant*,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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Supreme Court of the United States

OCTOBER TERM, 1925

No. 109

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, *Appellant*,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FOREWORD

The Hamburg-American Line Terminal & Navigation Company, the appellant, was incorporated under the laws of the State of New Jersey on October 26, 1899 (R. 1 and 4-10). It became a subsidiary of the Hamburg-American Line, a German corporation, in that all of the issued and outstanding capital stock of the Hamburg-American Line Terminal & Navigation Company was beneficially held for said German corporation from October, 1899, to December, 1917, when said stock was seized and taken over by the Alien Property Custodian as enemy-owned (R. 1). The Alien Property Custodian exercised the rights of stock owner-

ship and elected a Board of Directors for Hamburg-American Line Terminal & Navigation Company to manage and control its affairs (R. 1-2). The Alien Property Custodian seized no money nor other property belonging to the Hamburg-American Line Terminal & Navigation Company, as such money or other property was recognized as belonging to the Corporation and not to its stockholders. Said Board of Directors, charged with the duty of administering the affairs of the Corporation, caused the original petition in this case to be filed in the Court of Claims of the United States on April 5, 1923 (R. 1), so as to bring the claim of appellant against the United States for its property requisitioned by the United States from appellant, within the six year period allowed for filing claims in said Court under the provisions of Section 156 of the Judicial Code, and, by leave of Court, filed an amended petition in said Court on February 19, 1924 (R. 1).

OPINION DELIVERED IN THE COURT OF CLAIMS

The Court of Claims of the United States, the court below, issued a short Memorandum upon passing judgment in this case, sustaining the demurrer to the amended petition of claimant below, holding that the action sounds in tort, citing Ribas y Hijo v. United States, 194 U. S., 315; Herrera v. United States, 222 U. S., 558; and that the Court of Claims is without jurisdiction to hear and determine the case, and, for its reasons in so deciding, making reference to the Court's Opinion in Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924. Neither said Memorandum nor said Opinion have been officially reported, but both appear in the printed Record (R. 12-19).

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

From the judgment rendered on the 17th day of March, 1924, by the Court of Claims, adverse to claimant below (R. 12), claimant below derives its right to an appeal to the Supreme Court of the United States, pursuant to the provisions of Sections 242 and 243 of the Judicial Code and the Rules of the Supreme Court.

Claimant below upon the claim set up in its petition to the Court of Claims prayed for a judgment in its favor against the United States in the sum of $184,125.66, with interest (R. 4), and the judgment entered in said Court and apealed from sustained a demurrer to claimant's amended petition and dismissed said petition (R. 12).

Claimant below filed a motion on May 15, 1924, for a new trial, and on May 26, 1924, the Court of Claims filed an order overruling said motion (R. 20). On June 4, 1924, claimant below made application for, and gave notice of, an appeal to the Supreme Court of the United States, both from the judgment of the Court of Claims sustaining defendant's demurrer and dismissing claimant's amended petition on the grounds that the action sounded in tort, and that the Court of Claims was without jurisdiction to hear and determine the case and from the order overruling claimant's motion for a new trial; and, on June 16, 1924, the Court of Claims allowed the appeal (R. 20).

Claimant below in its said petition alleged that it is a corporation, created by and existing under the laws of the State of New Jersey, organized October 26, 1899 (R. 1 and 4-10) that many years prior to April 6, 1917, by expenditures amounting in the total to $120,659.00, it acquired title to two tug boats (steam screws), a launch (steam screw), a barge, and a coal hoister, all of which floating craft, were constructed in the United States and were at all times used in claimant's business, carried on in the Port of New York,

until on or about the sixth day of April, when they were requisitioned by the Government of the United States (R. 2), acting through United States Customs officials attached to the Treasury Department, that on or about April 17, 1917, the Depot Quartermaster, New York, acting under orders from the Secretary of War, upon direction of the President, pursuant to the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), took possession and assumed control of said floating craft (R. 3), and said floating craft has ever since remained in the custody of the War Department of the United States of America, without any expressed agreement with claimant concerning the compensation to be paid to claimant for its property so taken for public use, that claimant below founded its claim upon said Act of August 29, 1916, upon the provision of the Constitution of the United States reading "nor shall private property be taken for public use, without just compensation," and/or an implied contract with the Government of the United States arising out of the facts stated in said petition, and that no compensation has been paid to claimant below for its property so taken and used (R. 3 and 4).

Upon the claim so presented, the Court of Claims entered its judgment, sustaining the demurrer to the petition and dismissing said petition, said Court holding that the action sounds in tort and that it is without jurisdiction to hear and determine the case (R. 12). From the judgment of the Court of Claims, entered March 17, 1924, an appeal to the Supreme Court of the United States was allowed on June 16, 1924 (R. 20), and the appellant asks that said judgment be reversed so that its case may be heard upon its merits and the claimant below be awarded proper compensation

CASE BELIEVED TO SUSTAIN THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The present case comes before the Supreme Court of the United States on an appeal from judgments of the Court

of Claims, one (R. 12) entered March 17th, 1924, sustaining a demurrer to claimant's amended petition and dismissing the said petition on the grounds that the action sounds in tort and that the Court of Claims is without jurisdiction to hear and determine the case set up in said petition, and another (R. 20) entered May 26, 1924, overruling claimant's motion of May 15, 1924, for a new trial. This case, therefore, comes before the Supreme Court of the United States in practically the same manner as did the case of A. W. Duckett & Co., Inc., v. United States (58 Ct. Cl. 234, 403), which was dismissed April 16, 1923, by the Court of Claims for want of jurisdiction, after findings of fact by the Court of Claims, and with respect to which a motion for a new trial was overruled May 28, 1923, by the Court of Claims upon the same grounds. In dismissing this case for want of jurisdiction, the Court of Claims held that the circumstances of the case did not justify the implication of a contract on the part of the United States to pay the plaintiff for the use of its property acquired by the United States under said Act of August 29, 1916 (39 Stat. 645). From the judgments of the Court of Claims dismissing plaintiff's petition for want of jurisdiction and overruling plaitniff's motion for a new trial, plaintiff was allowed an appeal to the Supreme Court of the United States, where the appeal was heard and decided, the judgment below being reversed, with directions to the Court of Claims to award proper compensation to the appellant (A. W. Duckett & Co., Inc., v. U. S., 45 S. Ct. 38). In the present case, there were no findings of fact, as the dismissal for want of jurisdiction was by a judgment on demurrer, but under the established rules of pleading the facts alleged in claimant's petition were regarded, for the purpose of trying the issue raised by the demurrer, as true, and said facts, concisely stated above, make the present case almost analogous to the case of A. W. Duckett & Co., Inc., other than that claimant in the instant case was the absolute owner of the property taken, while plaintiff in the A. W. Duckett & Co.,

Inc., case held but a leasehold interest in the property taken.

In the case of A. W. Duckett & Co., Inc., Mr. Justice Holmes, among other things, said:

> "The Court of Claims dismissed the petition for want of jurisdiction, upon the ground that the facts found excluded, as matter of law, the possibility that a contract should be implied and that therefore there could be no claim.
>
> * * * * * * *
>
> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims. United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

As the Supreme Court has the sole right to pass upon the question of its own jurisdiction to entertain appeals invoking such jurisdiction, and it assumed jurisdicton to hear and determine the appeal so brought by A. W. Duckett & Co., Inc., the appellant in the present case, presenting in its appeal points of fact and of law quite analogous to those in the case so heard and determined, believes the case of A. W. Duckett & Co., Inc., sustains the jurisdiction of the Supreme Court to hear and determine appellant's case.

STATEMENT OF CASE

Appellant, claimant, below, is a corporation created by and existing under the laws of the State of New Jersey (R. 1; R. 4 and 10), and it has been such since October 26, A. D. 1899 (R. 1). It has its registered office in the State of New Jersey at No. 15 Exchange Place, Jersey City, New Jersey (R. 2). Prior to the matters hereinaftermentioned, it was the owner of certain floating craft, consisting of two tug-boats, a steam-screw launch, a barge, and a coal-hoister, all of which it used in its business carried on in the Port of New York (R. 2). The business there

carried on by it was that of warehousemen and wharfingers (R. 1; R. 5). On or about April 6, 1917, said floating craft had a market, or commercial, value estimated at $184,-124.66 (R. 2), when the United States by the Treasury Department, requisitioned or commandeered all of said floating craft, and later, to-wit: On April 17, A. D. 1917, turned the same over to the Depot Quartermaster Corps, New York, for the use of the Army Transport Service, the Secretary of War, upon directions from the President, pursuant to the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), having ordered the Depot Quartermaster, New York, to take possession and assume control thereof, and said floating craft have ever since remained in the custody of the War Department of the United States of America (R. 3). Appellant, as claimant below, filed a petition in the Court of Claims of the United States on April 5, 1923 (R. 1), and founded its suit for compensation, for the property so taken and retained, upon said Act of August 29, 1916, and upon the provision contained in the Fifth Amendment to the Constitution of the United States expressed in the words: "nor shall private property be taken for public use, without just compensation," and upon an implied contract arising out of the facts relating to said taking and detention (R. 3). Appellant, claimant below, has at no time been awarded or paid compensation on this claim (R. 4). Appellant is the sole owner of the claim and has not assigned or transferred the same, or any part thereof or interest therein, and appellant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government (R. 4).

To the said petition filed in the Court of Claims of the United States, as aforesaid, the United States, as defendant, filed a demurrer on May 26, 1923 (R. 1). On February 19, 1924, by leave of court, appellant, as claimant or plaintiff below, filed an amended petition (R. 1), and said de-

murrer was allowed to stand to the amended petition (R. 12). The grounds of demurrer were that the petition failed to state a cause of action against the United States (R. 12). On March 17, 1924, the Court of Claims of the United States made an order sustaining the demurrer and dismissing said petition, as amended (R. 12), said Court of Claims holding in a memorandum issued by it that the action sounded in tort and that the Court was without jurisdiction, and made reference to its Opinion in the case of Deutsch-Australische Dampschiffs-Gesellschaft, No. C-576 of said Court, decided March 17, 1924 (R. 12; R. 13 and 19).

On May 15, 1924, appellant, as the claimant or plaintiff below, filed a motion in the Court of Claims of the United States for a new trial, and on May 26, 1924, the Court filed an order overruling said motion (R. 20).

Appellant, as the claimant below, on June 4, 1924, made application for an appeal to the Supreme Court of the United States, both from the judgment rendered on March 17, 1924, and from the order entered May 26, 1924, overruling said motion for a new trial, and on June 16, 1924, said Court of Claims allowed the application for appeal as prayed for (R. 20).

SPECIFICATION OF ERRORS

1. The Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

2. The Court of Claims committed error in holding that the action sounds in tort.

3. The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

4. The Court of Claims committed error in applying to its decision of claimant's case the reasons upon which it decided the case of Deutsch-Australische Dabpfschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

ARGUMENT

I

The Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition. Said demurrer, filed May 26, 1923, reads as follows:

> "Defandant demurs to the petition in the above-entitled case for the reason that it does not state a cause of action against the United States" (R 12).

This demurrer in form and substance is a general demurrer, raising but a single issue, to-wit: Assuming the facts alleged in the petition to be true, do they state a cause of action by claimant against the United States?

With respect to the effect of a demurrer, it is first a rule that *a demurrer admits all such matters of fact as are sufficently pleaded.* A demurrer is, consequently, an admission that the facts alleged are true; and, therefore, the only question for the Court is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged (Stephen on Pleading, 143). The facts alleged in claimant's petition show that the United States took for its use, by means of separate acts of taking, valuable property of claimant, without giving any compensation for the property taken, thus leaving claimant to seek just compensation for the property so taken under such provisions of law as the United States has provided in like instances. The first of said separate takings gave the United States temporary police control over claimant's property in the Port of New York upon the arising of a national emergency, a declaration of war. The second of said takings, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), gave to the United States the use of said property, consisting of two tug-boats, a launch, a barge, and a coal hoister for the transfer or

transportation of troops, war material and equipment, or for such other purposes connected with the then existing emergency as were needful. It is submitted that either of these takings, which, without fault of the claimant or assertion of adverse title by the Government, deprived claimant of the use and possession of its property, or its title thereto, under proper legislative authority and executive acts, created an obligation on the part of the Government to make just, full and complete compensation to claimant, said obligation arising under the provisions of the Fifth Amendment to the Constitution of the United States, and this obligation it has been held in a long line of cases, including the following:

U. S. v. Russell, 13 Wall. 623.
U. S. v. Great Falls Mfg. Co., 112 U. S. 645.
U. S. v. Lynah, 23 S. Ct. 349
DeCamara v. Brooke, 135 Fed. 384.
U. S. v. Buffalo Pitts Co., 34 S. Ct. 840.
U. S. v. North American Transportation and Trading Co., 40 S. Ct. 519.
A. W. Duckett & Co., Inc., v. U. S., 45 S. Ct. 38

is sufficient to support an implied promise on behalf of the Government to pay just compensation for the property taken, provided the taking was duly authorized by the Government and did not sound in tort. Such implied promise brings appellant's case within the class of claims founded upon implied contracts, which the Court of Claims derived jurisdiction to hear and determine under the Act of Congress (10 Stat. 612), approved February 24, 1855, providing for the organization of the Court of Claims, and such jurisdiction has at no time subsequently been taken away from said Court.

The takings of appellant's said property for governmental use, as alleged in the petition, deprived appellant of the use and occupation of its property. It nowhere appears in the record that the Government was without due

authority to deprive appellant of the use and occupation of said property, to meet and supply a governmental need or use, it nowhere appears in said record that the Government in either of said takings asserted an adverse claim to said property, against the property rights and title of appellant, but it does appear that appellant, a citizen or subject of the United States, was deprived by the Government of the use and occupation of appellant's said property, and it appears further in said record that the use and occupation of said property was taken by the Government, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), and it appears also in said petition that said property, when taken, had a commercial value estimated at $184,124.66 and that no compensation has at any time been awarded or paid to appellant by the Government for the property so taken. It is submitted, therefore, that if the taking of such use and occupation to said property constituted a taking sufficient to warrant the Court of Claims in finding the elements of contractual liability present, the demurrer to the petition should not have been sustained with respect to a taking that created an obligation on the part of the Government to make compensation to appellant.

The rules of the Court of Claims require that a petition must set forth "A plain, concise statement of the facts, giving venue and date, free from argumentative, irrelative and impertinent matter"—Rules of the Court of Claims, Rule 15 (2)—and rules of good pleading hold that it is not necessary to state such circumstances as merely tend to prove the truth of the fact, and that less particularity is required in alleging facts when they lie more in the knowledge of the opposite party than they do in the knowledge of the party pleading—Stephen on Pleading, 342, 370.

It is submitted that the Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

II

The Court of Claims committed error in holding that the claimant's action sounds in tort.

The jurisdiction of the Court of Claims is limited by Section 145 of the Judicial Code so as not to apply to cases sounding in tort. This limitation is founded upon a sound public policy. Commenting on said policy, the Supreme Court by Mr. Justice Brewer, in Schillinger v. United States, 155 U. S. 163, 15 S. Ct. 85, said:

> "Under neither of these statutes had or has the Court of Claims any jurisdiction of claims against the Government for mere torts. Some element of contractual liability must lie at the foundation of every action. In Gibbons v. U.S.,8 Wall. 269, 275, it was said: 'The language of the statutes which confer jurisdiction upon the Court of Claims excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.' And again, in Morgan v. U. S., 14 Wall. 531, 534: 'Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officers of the Government.' "

It is clear, therefore, that this policy, imposed by necessity, is aimed at the protection of the Government *from liability for unauthorized wrongs inflicted by their officers on the citizens.* This public policy, as thus clearly formulated, cannot be made to cover seizures of property expressly authorized by Act of Congress, when the officers making the seizures were acting entirely within their proper legislative authority. No question is raised in the instant case as to the authority of any officer or agent of the United States in the matter of seizures of the ap-

pellant's floating craft. In this case, the appellant, a national of the United States, doing business within the United States, has been divested of its property by reason of the seizure of that property under the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645). There is no question as to the authority of any subordinate officers or agents of the Government in carrying out the President's directions.

It is contended, therefore, that the appellant's case is not an action sounding in tort within the meaning of said jurisdictional limitation, since no question of unauthorized action arises.

Furthermore, it is submitted that the cases cited by the Court of Claims in its Memorandum Opinion (R. 12) are clearly distinguishable from the instant case. Both these cases (*Ribas y. Hijo* case, 194 U. S. 315; and *Herrera* case, 222 U. S. 558) are Spanish-War seizure cases and only incidentally involve the jurisdiction of the Court of Claims under the Tucker Act.

The *Ribas y. Hijo* case (194 U. S. 315) was an action brought by a Spanish corporation to recover from the United States the value of the use of a merchant vessel seized by the United States military forces in Ponce, Porto Rico, at the time of the capture of that place by American military forces.

The *Ribas y. Hijo* case differs from the appellant's case in three important respects:

(1) In the Hijo case the claimant was a Spanish corporation resident in the actual theater of war, and, therefore, clothed with enemy nationality and subject to the disabilities of that status. In the instant case, the claimant is a corporation of the State of New Jersey, and, therefore, clothed with American nationality and entitled to enjoy all its constitutional rights, including all safeguards to its property.

(2) In the Hijo case, the action was brought against the United States to recover the value of the use of a vessel

during the time the vessel was held by the military forces of the United States. In the instant case, the action was brought against the United States to recover the value of the appellant's right, title and interest in its floating craft which were appropriated by the United States under the authority of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645).

(3) In the Hijo case the seizure was effected by military forces of the United States in Ponce, Porto Rico, at the time of its capture by American military forces, when this port was in the actual theater of military operations. In the instant case, the seizure was effected by officers of the United States acting in a civil capacity under due authorization by Congress, and in ports of the United States three thousand miles or more away from the scenes of actual military operations. In the Hijo case, the seizure was clearly a military seizure, carried out under the general discretionary authority vested in military officers. If these officers in the exercise of that authority made any mistake in judgment as to the seizeure, the resulting wrong to the owner of the vessel was then unauthorized and within the jurisdictional limitations referred to above. There was in the Hijo case no special authorization directing the seizure of the vessel nor any participation in the seizure by civil authorities.

Furthermore, it clearly appears from the decision of the Supreme Court that the tort ground was a secondary and incidental ground of decision in the Hijo case. The primary ground of decision was the mutual relinquishment of claims by Spain and the United States under Treaty provisions. This appears in the Opinion of the Court, as follows:

> "We may add that even if the Act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail; for, it is well settled that in case of a conflict between an act of Con-

gress and a treaty—each being equally the supreme law of the land—the one last in date must prevail in the Courts."

In the Herrera case (222 U. S. 558), there are also grounds of distinction from the instant case, very similar to those in the Hijo case. The claimant in the Herrera case was a Spanish national resident in the war zone, and, therefore, stamped with the status of an enemy alien. The seizure of the vessel was also a seizure made in the actual theater of military operations by United States military officers acting rightly or wrongly under their general discretionary military authority.

The Supreme Court took the same general position in the Herrera case that it took in the Hijo case; that is, that the seizure was military rather than civil; that, if the military officers of the United States acted rightly within their military authority, there was no ground of claim; if they acted wrongly, the wrong was a tort, since it involved unauthorized action by an officer of the Government, and there could be no claim within the jurisdiction of the Court of Claims, and that, in any event, the claim was disposed of under the Treaty of Peace through the mutual relinquishment of claims by the belligerents on behalf of their respective nationals. With reference to these points, Mr. Justice McKenna, in delivering the opinion of the Court, said:

"We have, then, these propositions established: Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemies' property, and subject to seizure, confiscation, and destruction. It would seem necessarily to follow that the claimants in this case were enemies of the United States, and their property subject to the necessities of war. And this is but the application of the rule which declares that war makes of the citizens or subjects of one belligerent enemies

of the government, and of the citizens or subjects of the other."

* * * * * * *

"We are then brought to consider the quality of the act of the officers of the Army who seized and used her. It would seem easy to describe. If it was done in violation of the President's proclamation, if it was done in violation of the laws of war and the conditions arising from the capitulation of Santiago, it was done in wrong, and claimants encounter the prohibitions of the Tucker act against the jurisdiction of the Court of Claims. They are in the situation of the claimant in J. Ribas y Hijo v. United States, and Juragua Iron Co. v. United States. A tort was committed against them, and though committed in the interest of the United States, there is no element of contract, and the action is one of which the Court of Claims could not take jurisdiction, whatever other redress is open to claimants."

It is clear, therefore, that in both of the above mentioned cases, cited by the Court of Claims in support of its holding that the instant case sounds in tort, the tort ground was really a secondary consideration in the decision, there being more important war and treaty questions involved. Moreover, even though the tort ground had been the principal ground of the decision, the cases cited by the Court of Claims are readily distinguishable from the instant case. While the cited cases rest upon grounds which bring them clearly within the statutory policy underlying the tort jurisdictional limitation as set forth in the Tucker Act, yet such grounds do not appear in the instant case. The instant case involves no question of unauthorized action by Government officers and no question of losses suffered by an enemy alien within the war zone. It does involve, however, a taking of the claimant's floating craft as authorized by Congress under circumstances that afford a basis for the implication of a contract.

It is submitted that the cases this Court has decided purely on the tort ground are within the underlying statu-

tory policy of protecting the Government from liability for the unauthorized action of its officers and agents and that they, therefore, have no bearing on the instant case.

III

The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

The Court of Claims is a court of limited statutory jurisdiction. In the instant case, it is contended that on the facts, as set forth in the appellant's amended petition in the Court of Claims, the case comes within the jurisdiction of the Court of Claims, both as regards person and subject matter.

The only limitation on the jurisdiction of the Court of Claims with reference to persons, as proper party claimants, is Section 155 of the Judicial Code. This Section is a re-enactment of Section 1068 R. S. and provides:

> "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction."

This provision of the Judicial Code raises the question of a claimant's nationality as a jurisdictional consideration. The appellant and claimant herein is a corporation organized and existing under the laws of the State of New Jersey.

Corporate nationality generally is fixed by the country and state of incorporation. In Insurance Company v. Francis (11 Wall. 210), this Court, by Justice Davis, said:

> "This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created."

In Shaw v. Quincy Mining Company (145 U. S. 444; 12 S. Ct. 937), appears the following:

> "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it."

As regards the question of corporate nationality, more particularly with reference to the jurisdiction of the Court of Claims under the Tucker Act, Judge Rogers, of the Second Circuit, in U. S. v. N. Y. & O. Steamship Company (216 Fed. 61), said:

> "A corporation is a citizen of the country or state by which it was incorporated and it has its residence in such country or state and not elsewhere."

It is clear, therefore, that the appellant corporation is a national of the United States by reason of its incorporation in the State of New Jersey. It is also clear that there is no ground on which the jurisdiction of the Court of Claims could be denied because of the lack of a proper party claimant on the ground of alienage within the meaning of Section 155 of the Judicial Code as set forth above.

It is contended also that the Court of Claims has jurisdiction of the subject matter and character of the claim in the instant case.

It is a fundamental proposition of law that a sovereign state may not be sued in its own courts without its consent (Haycraft v. U. S., 22 Wall. 81), which consent may be granted upon such terms and conditions as the sovereign state may deem appropriate (Schillinger v. U. S., 155 U. S. 163; 15 S. Ct. 85). Prior to the year 1855, the Government of the United States withheld its consent to be sued, and up

to that time a claimant against the United States had recourse only to a direct appeal to the bounty of Congress. Under the Act of February 24, 1855 (10 Stat. 612), Congress, in providing for the organization of the Court of Claims, gave qualified consent to suits being brought against the United States, in defining the jurisdiction of the newly organized Court of Claims as follows:

> "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress."

By the Act of March 3, 1863 (12 Stat. 765), the jurisdiction of the Court of Claims was enlarged by the following provision:

> "That the said Court * * * shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court."

The Act of March 3, 1887 (24 Stat. 505), known as the Tucker Act, further enlarged the jurisdiction of the Court of Claims so as to include "all claims founded upon the Constitution of the United States."

The jurisdiction of the Court of Claims to hear and determine appellant's case is covered by the jurisdiction given said Court in Section 145 of the Judicial Code, as follows:

> "All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages,

> liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."
>
> 2 U. S. Comp. St. 1916, Sec. 1136, p. 1468.

While the Court of Claims has assumed jurisdiction in few cases based solely upon the Constitution of the United States, nevertheless the Constitutional ground has been included as a constituent element in the Court of Claims assuming jurisdiction of cases raised partly on other grounds, particularly on that of an implied contract. The Court of Claims in deciding the present case upon demurrer, made reference in its Memorandum (R. 12), for its reasons, to its Opinion in the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924, and in said Opinion the Court said: :

> "As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay." (R. 16.)

In United States v. North American Transportation and Trading Co. (40 S. Ct. 519), Mr. Justice Brandeis said:

> "When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor."

From this and other cases, defining and construing the jurisdictional powers of the Court of Claims, it clearly appears that the ground on which jurisdiction of the Court of Claims is most frequently assumed is that of implied

contract, and it further appears that an implied contract may not be set up for jurisdictional purposes without satisfying certain elements of contractual liability or establishing the bases on which the implication of contract can rest. These bases may include either a Constitutional basis, as the Constitutional prohibition against the taking of private property for public use without just compensation, or a legislative basis, as the taking of private property under the exercise of authority provided by appropriate legislation.

In the present case, it is submitted that the facts alleged in claimant's petition present a foundation, including both the Constitutional and the legislative bases, to support an implied contract, thereby bringing claimant's case within the statutory jurisdiction of the Court of Claims.

IV.

The Court of Claims committed error in applying to its decision of appellant's case the reasons upon which it decided the case of the Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924 (R. 13-19). The legislative basis relied upon in that case upon which to found elements of contractual liability was said Joint Resolution of May 12, 1917 (40 Stat. 75) only, while in appellant's case the legislative basis upon which to found the elements of contractual liability in the Government taking claimant's property is the Act of Congress of August 29, 1916 (39 Stat. 645), a legislative basis held by the Supreme Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38) sufficient to sustain the elements of contractual liability and to give to the Court of Claims jurisdiction to hear and determine the case as founded upon implied contract.

In said opinion, to which the Court of Claims makes reference in its Memorandum (R. 12) for its reasons in deciding it is without jurisdiction to hear and determine the instant case, the Court says:

"It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, Par. 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court" (R. 15).

The "Trading With the Enemy Act" (40 Stat. 411) has been held, in the cases cited which have reference to it, to be an exercise of the war power of Congress, finding support in the Constitutional provision that empowers Congress to declare war and to make rules concerning *captures* on land and water (Art. 1, sec. 8, cl. 11), but none of said cited cases construe said Act of August 29, 1916 (39 Stat. 645) to be an exercise of the war power of Congress, so supported. A "capture," in technical language, is a taking by military power (U. S. v. Athens Armory, 24 Fed. Cas. 878,880), and it is the taking of property by one belligerent from another (In re: Whitfield, 11 Ct. Cl. 444, 456). The taking of property by the United States of a citizen or subject of the United States could not be termed "capture," in the technical use of the term, but would be a "seizure" or "taking," and it is submitted that such seizure or taking by the United States of the property of its citizen or of its

subject would not be a "capture" within the meaning of the term "captures" as used in Art. 1, sec. 8, cl. 11, of the Constitution of the United States. Appellant, claimant below, is a citizen or subject of the United States, having been since October 26, 1899, a corporation created by and existing under the laws of the State of New Jersey (R. 1). The property which the United States took from claimant was floating craft consisting of two tug-boats, a launch, a barge, and a coal hoister, all of which were built in the United States and documented under the laws of the United States at New York, and said craft were used in claimant's business, carried on in the Port of New York, State of New York, until same were requisitioned by the Government of the United States (R. 3). The last part of the above quotation from said Opinion reads: "if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this Court." Said floating craft of claimant should not be included with said property, as the Alien Property Custodian had no authority under the "Trading With the Enemy Act" (40 Stat. 411) to take or seize the property of an American corporation. In the case of Behn, Meyer & Co., Ltd., v. Miller, et al. (45 S. Ct. 165) Mr. Justice McReynolds, delivering the Opinion of the Court, said:

> "Before its passage the original Trading With the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in Daimler Company, Limited, v. Continental Tyre & Rubber Company, etc., 2 A. C. (1916) 307, decided June 30, 1916.
>
> "Section 7, subsection (c), was never intended, we think, to empower the President to seize corporate property merely because of enemy stockholders' inter-

> ests therein. Corporations are brought within the carefully framed definitions (section 2) of 'enemy' and 'ally of enemy' by the words: Any corporation incorporated within such territory of any nation with which the United States is at war (or any nation which is an ally of such nation) or incorporated within any country other than the United States and doing business within such territory. And we find no adequate support for the suggestion that Congress authorized the taking of property of other corporations because one or more stockholders were enemies. Logically carried out this view would have permitted the seizure of all property of companies incorporated by any associated power—*e. g.*, Great Britain—solely because some German held one share of the many thousands. The result indicates that the premise is bad. What the President might do was plainly set down in well-considered words."

From the definitions of "enemy" and "ally of enemy," given in the last quotation, special attention is called to the words: "or incorporated within any country other than the United States and doing business within such territory." It may be held that a corporation incorporated in the United States could carry on business within the territory of a nation with which the United States was at war and not an "enemy" or "ally of enemy" as those terms are used in the "Trading with the enemy Act." Said Act made it unlawful for any person in the United States, except with the license of the President granted to such person, to trade with an enemy or ally of enemy, and any person violating the provision of the Act could be punished, under the provisions of the Act, but such person's property was not authorized to be seized by the Alien Property Custodian as *enemy* property. Corporations incorporated within the United States can under no circumstances be brought within the terms "enemy" or "ally of enemy" as used in said Act. The Court of Claims, therefore, could not properly include appellant's property when it says (R.

16): "In the instant case the court is asked to order compensation for *enemy* property seized by authority of a legislative act that is silent on the question of jurisdiction."

As appellant was not an *enemy*, being an American corporation, and its property when taken by order of the President was not *enemy* property, but was documented under the laws of the United States, appellant's case is clearly distinguishable from the case of said Deutsch-Australische Dampfschiffs-Gesellschaft (R. 12-19) and the reasons governing the decision of the Court of Claims in the latter case are irrelevant and not properly applicable to appellant's case.

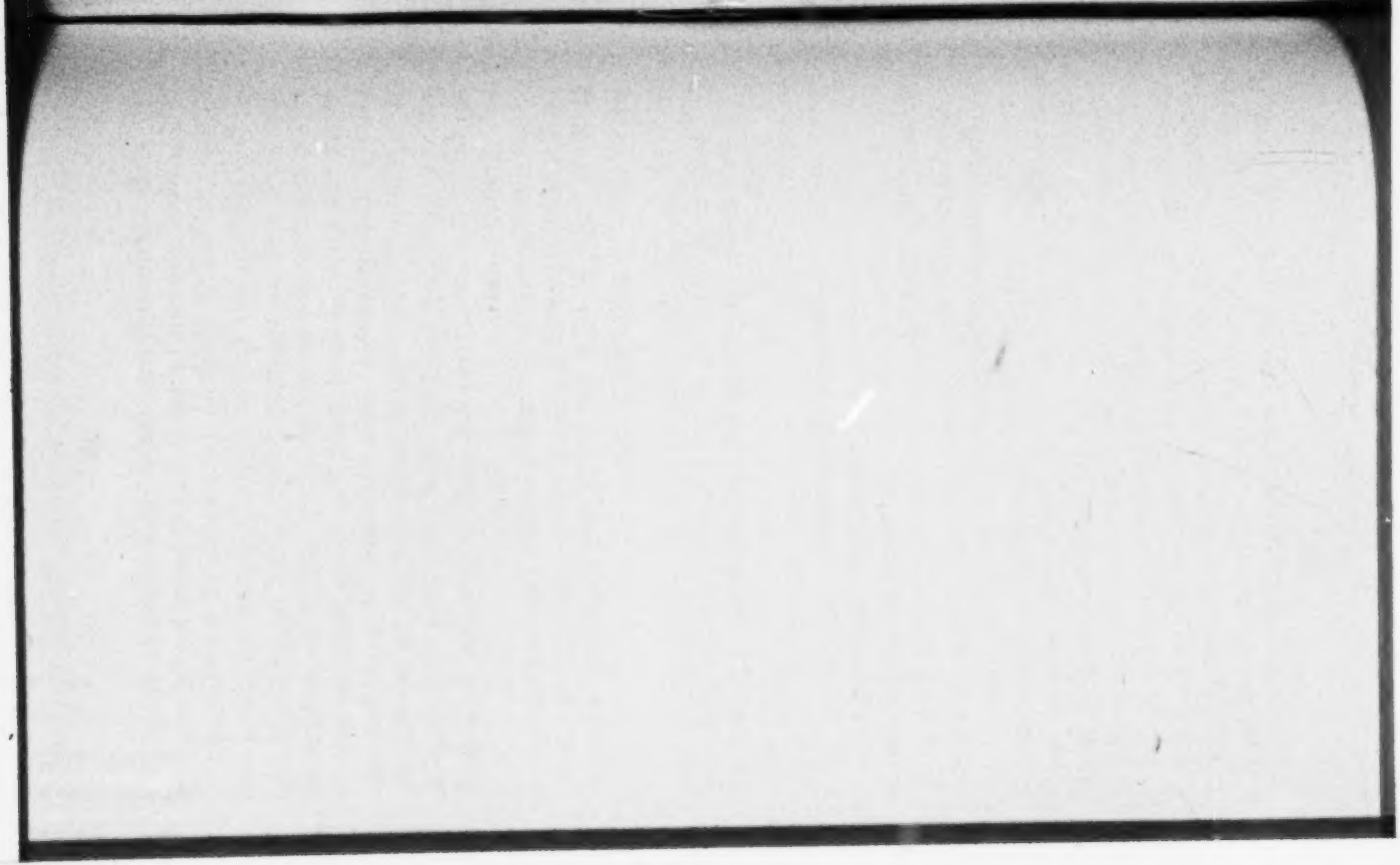
Are not, therefore, the words of Mr. Justice Holmes, as used in the opinion of this Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38) applicable with peculiar force to appellant's case:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims."

Respectfully submitted,

CHARLES H. LEFEVRE,
Attorney for Appellant.

402-3-4 Hibbs Building,
Washington, D. C.
September 4, 1925.



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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

Original No. 4
IN EQUITY.

STATE OF NEVADA, *Complainant*,

v.

CROWN WILLAMETTE PAPER COMPANY, a Corporation organized and existing under and by virtue of the laws of the State of Maine, *Defendant*.

STIPULATION.

M. A. DISKIN,
Attorney-General of Nevada,
Attorney for Complainant.

FRANK H. NORCROSS,
OSCAR SUTRO,
W. H. ORRICK,
Attorneys for Defendant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

Original No. 30

IN EQUITY.

STATE OF NEVADA, *Complainant*,

v.

CROWN WILLAMETTE PAPER COMPANY, a Corporation organized and existing under and by virtue of the laws of the State of Maine, *Defendant*.

STIPULATION.

WHEREAS, The above-entitled action was instituted by the State of Nevada in the above-entitled Court on the 15th day of February, 1918, praying for a permanent injunction prohibiting the above-named defendant from depositing certain alleged deleterious liquids and substances in the Truckee River (an interstate stream flowing from the state of California into the State of Nevada) to the injury of the State of Nevada and particularly of the domestic water supply of the cities of Reno and Sparks and other munici-

palities within the State of Nevada, and injurious to the fish life of said stream; and

WHEREAS, The defendant is the owner of, and operates a sulphite pulp and paper mill on or near said river situated at Floriston, California, and it is claimed by complainant that prior to the institution of said suit a predecessor in interest of defendant had been depositing into said river from the operations of its said plant certain particles of wood fibre or pulp and certain quantities of spent sulphite cooking liquor used in its process of manufacture of paper, which by the natural flow of said river reached the sources of supply of water for municipal purposes of said cities of Reno and Sparks, and, also, as claimed by the complainant, affected the fish life in said river within both the State of California and the State of Nevada; and

WHEREAS, In order to avoid any objection upon the part of complainant, defendant or its said predecessor in interest constructed a pumping device designed to, and which did, pump said liquor to certain bench land beyond said river channel; that said pumping device was at said time and for some years thereafter considered to be a solution of the controversy between said parties, but it is claimed by complainant that in the course of time a portion of said liquor so pumped to said bench land began gradually to seep through the earth, rock, and soil, and that a portion thereof, in a somewhat changed form, was returned to the river channel; and

WHEREAS, Defendant or said predecessor in interest of defendant thereupon caused to be constructed within its said plant at Floriston a device for evaporating the said liquor and burning the residue thereof with other fuels used in the defendant's processes for

the manufacture of paper, but that said evaporating device proved to be unsatisfactory; and various other devices and methods for the purpose aforesaid have been installed and tested by defendant, none of which have been found to be entirely satisfactory to the parties hereto; and

WHEREAS, The total investment of defendant in connection with said plant amounts to approximately three million ($3,000,000) dollars; and

WHEREAS, The defendant corporation has expended in said pumping, evaporating, and other devices, in order to obviate any objections upon the part of complainant, whether substantial or otherwise, approximately three hundred thousand ($300,000) dollars; and

WHEREAS, Defendant on July, 1926, had on hand, at or near said plant, forty-five thousand (45,000) cords of cut fir wood designed for manufacture into pulp and paper and representing an investment of an amount claimed by the defendant to exceed or closely approximate three hundred thousand ($300,000) dollars, and which investment would be largely lost to the defendant if it did not continue to operate said sulphite mill; and

WHEREAS, The Forest Products Laboratory of the United States Forest Service is engaged in making experiments for the purpose of ascertaining the most effective method of disposing of the sulphite waste liquor resulting from the operations of sulphite mills, and extensive investigations to the same end are now being conducted by various states, associations, and corporations, and it is anticipated that effective methods for the purpose aforesaid will be discovered through such investigations; and

WHEREAS, For the parties hereto to prepare evidence for presentation to the court upon the issues involved in this suit would require the expenditure of large sums of money, both upon the part of complainant and defendant, which expenditure would, or might be, of no substantial benefit to the parties; now, therefore,

IT IS HEREBY STIPULATED AND AGREED by and between the parties to this action, subject to the approval of the Supreme Court of the United States, as follows:

I.

That, pending the submission and final determination of this cause and at all times after the date hereof, the defendant will install and hereafter maintain and operate a sufficient number of filters and screens as will prevent wood pulp and fibre from entering said river in Nevada.

II.

That defendant will make all reasonable efforts to find a satisfactory method of disposing of said spent sulphite cooking liquor, and will prosecute with dispatch researches for that purpose; and that complainant will cooperate and suggest to defendant for adoption any feasible method which may be discovered or ascertained by it.

III.

That, subject to the conditions hereinafter set forth, said court shall, at the call of the calendar of the October Term, 1929, enter an order granting to complainant

herein a perpetual injunction against defendant operating said sulphite mill, in such form and containing such provisions as shall be deemed proper by said court. That, for the purpose of assisting the court in determining the provisions to be inserted in the decree in said cause, the parties shall endeavor to agree upon the form of such decree and, failing such agreement, complainant shall, within sixty (60) days next prior to October 1, 1929, serve upon defendant a copy of the form of decree proposed by it; that defendant, within thirty (30) days after the service upon it of the form of decree proposed by complainant, shall serve upon complainant a copy of the form of decree proposed by defendant. During the period of six (6) months next prior to June 1, 1929, complainant and defendant, or either of them, may take testimony before the Master appointed heretofore by said court, or some other Master appointed by it, upon due notice, for the purpose of determining the provisions which should be inserted in said decree. That said form of decree agreed upon by said parties, or, in the event of their failure or inability to agree thereon, said proposed form of decree prepared and served upon defendant by complainant and said proposed form of decree prepared and served upon complainant by defendant, together with the testimony so taken, shall be submitted to said court; and that, from the testimony so submitted, said court shall determine the provisions to be inserted in said decree.

IV.

Notwithstanding anything to the contrary contained herein, it is agreed that, if on October 1, 1929, either of the following conditions shall exist, to wit:

(1) A new or different method for the disposal of the spent sulphite cooking liquor from said sulphite mill from that now employed shall have been discovered or ascertained by either of the parties hereto or by any of the agencies hereinbefore mentioned and shall have been installed and put in operation six months prior to October 1, 1929, which method shall receive the approval of complainant or its agents as being effective to prevent pollution of said river in Nevada from liquor from said sulphite mill, and such approval shall be signified by memorandum in writing filed with the Clerk of the Supreme Court of the United States prior to October 1, 1929; provided that, in the event the complainant or its agents shall disapprove the method or methods adopted by the defendant for the disposal of said spent sulphite cooking liquor, notice of such disapproval shall be served upon defendant in writing within thirty (30) days after notice from the defendant to complainant of the installation of such new or different method, and, provided, however, that, in the event defendant shall have reasonable cause to believe that the determination of complainant to its agents is not in accordance with the facts, said method shall, upon demand of defendant, be submitted for approval to a committee of three arbitrators, one to be selected by complainant and one to be selected by defendant, and these two to select the third one, and, in the event they are unable to agree upon such third arbitrator the same to be selected by any of the following in the order named, to wit; the Chief Justice or any Associate Justice of the Supreme Court of the United States, or the presiding Justice or any Justice of the United States Circuit Court of Appeals for the Ninth Circuit, or the Chief Engineer of the United

State Forest Service, or the District Engineer of Forest Service, District Five, United States Department of Agriculture, or the District Engineer of Forest Service, District Four, United States Department of Agriculture; the officer to make such selection to be agreed upon by the parties hereto, or failing such agreement, application for such selection to be made to said officers in the order named, and that such determination so made by a majority of said board of arbitrators, signifying their approval of such method, shall be filed with the Clerk of the Supreme Court of the United States prior to October 1, 1929; or

(2) Said sulphite mill shall be dismantled and proof of such dismantling shall be established by defendant by satisfactory evidence and filed with the Clerk of the United States Supreme Court prior to September 15, 1929; provided, that (unless by consent in writing complainant agrees to some other form of dismantling) it shall be deemed sufficient proof of such dismantling if it is established that the following vital and necessary parts to the operation of such sulphite mill have been removed therefrom, to wit: the ovens, burners, and gas fans, and that they will not be replaced or other substitutes installed therein except by consent of complainant or upon order of court;

Then, and in either of said events, said injunction shall not be issued.

It is further stipulated and agreed that any decree of injunction so entered shall contain a clause authorizing the Supreme Court of the United States, upon proper showing, at any time thereafter, to modify the terms of said decree in accordance with the proofs presented.

It is further stipulated that, if the Supreme Court

of the United States refuses, upon grounds not involving the merits of the application, to make any order for the replacement of parts removed from said mill, then the determination of the question as to whether such replacements may be made and the operations of said sulphite mill resumed shall be decided by arbitrators appointed and acting pursuant to the provisions contained in paragraph (1) hereof.

IV-a.

It is further stipulated, and defendant agrees, that when and if an efficient method or process is discovered and installed by defendant for the treatment of the spent sulphite cooking liquors, that defendant will at all times thereafter while said sulphite mill is in operation maintain and operate such process for treating said spent sulphite cooking liquors; and if, at any time, said process for any reason shall fail to operate, that for said period of time defendant will discontinue operations of said sulphite department of said mill until such time as said process is repaired and will efficiently treat said spent sulphite cooking liquors.

V.

Nothing herein contained shall be deemed an admission by defendant that its operations, or those of its predecessors in interest, have polluted said river or now pollute the same, nor that complainant has at any time or at all consented to any act upon the part of defendant in respect to defendant's discharging of pulp fibre or sulphite cooking liquor into said stream.

VI.

In view of the foregoing, the parties hereto stipulate that said cause may be continued to the October Term, 1929, and then submitted for final determination by the Court according to this stipulation.

WHEREFORE, it is respectfully requested that the Court order such continuance.

Dated: September 21st, A. D. 1927.

M. A. DISKIN,
Attorney-General of the State of Nevada.

OSCAR SUTRO,
W. H. ORRICK,
FRANK H. NORCROSS,
Attorneys for Defendant.